Supreme Court, U.S.
FILED
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No. 01-

IN THE

Supreme Court of the United States

MICHAEL HUMMEL,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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44 pp

QUESTION PRESENTED FOR REVIEW

Should a criminal defendant who claims that governmental misconduct has resulted in a Fifth Amendment Due Process violation of the attorney-client privilege or a Sixth Amendment violation of the right to counsel have to show actual prejudice to make out a case for dismissal?

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The unpublished Opinion of the Court of Common Pleas of Schuylkill County (No. 336-A-1998), is reproduced at page 9a of Appendix B.

STATEMENT OF JURISDICTION

The Per Curiam Order of the Supreme Court of Pennsylvania, Middle District (No. 0082 M.D. Alloc. Dkt. 2001), dated June 29, 2001, may be found at 2001 Pa. LEXIS 1385 and is reproduced at page 23a of Appendix D.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a), which permits the Supreme Court to review final judgments or decrees rendered by the highest court of a State in which a decision could be had, when the validity of a treaty or statute of the United States is drawn in question; when the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or when any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment 4, states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched and the persons of things to be seized.

U.S. Constitution, Amendment 5, provides in part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Constitution, Amendment 6, states in part:

> In all criminal prosecutions, the accused . . . shall enjoy the right . . . to have assistance of counsel for his defense.

U.S. Constitution, Amendment 14, Section 1, provides in part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

42 Pa. C.S. § 5916 ("Confidential communications to attorney") provides:

> In a criminal proceeding counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

STATEMENT OF THE CASE

A. Jurisdiction of the Courts Below

The Supreme Court of Pennsylvania, the order of which is sought to be reviewed in this Petition, had jurisdiction of this matter pursuant to 42 Pa. C.S. § 724(a) ("Allowance of appeals from Superior and Commonwealth Courts"), which permits the review of final orders of the Superior Court and final orders of the Commonwealth Court upon allowance of appeal by any two justices of the Supreme Court upon petition of any party to the matter.

The Superior Court of Pennsylvania had jurisdiction of this matter under 42 Pa. C.S. § 742 ("Appeals from courts of common pleas"), which gives it "exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas, regardless of the nature of the controversy or the amount involved. . . ."

The Court of Common Pleas of Schuylkill County had jurisdiction of this case under 42 Pa. C.S. § 931(a) ("Original jurisdiction and venue"), which states that the courts of common pleas "shall have unlimited original jurisdiction of all actions and proceedings. . . ."

B. Facts

1. Procedural History

The Petitioner Michael Hummel, a police officer in Girardville Borough, Schuylkill County, Pennsylvania, was arrested on February 6, 1998, and charged with crimes that included involuntary sexual intercourse, aggravated indecent assault, and corruption of minors. After two hearings in June, 1999, the trial court refused to dismiss the case. After a jury trial, the Petitioner was convicted in November, 1999, of one count of aggravated indecent assault, in violation of 18 Pa. C.S. § 3125(8), and three counts of corruption of minors, in violation of 18 Pa. C.S. § 6301(a). He was sentenced on December 28, 1999, to a total of thirteen to twenty-six months of incarceration. Post-sentence motions were denied on April 24, 2000.

The Petitioner then appealed to the Superior Court of Pennsylvania, which affirmed in an Opinion dated January 5, 2001.

The Supreme Court of Pennsylvania denied the Petitioner's Petition for Allowance of Appeal in an Order dated June 29, 2001.

The Petitioner then filed this Petition.

2. Facts

In September, 1998, the Pennsylvania State Police executed a search warrant at the home of the Petitioner's parents in an attempt to find evidence to support allegations that the Petitioner's father was attempting to threaten

witnesses and obtain perjured testimony in his son's pending case. The Petitioner argued that his case should have been dismissed before trial because of prosecutorial misconduct that violated his Fifth Amendment right to due process and his Sixth Amendment right to counsel. He alleged that the police had seized and viewed confidential communications between him and his attorney during the search.

Trooper Nettles, of the Pennsylvania State Police, directed the search. He testified at the pretrial hearing on the Petitioner's motion to dismiss that the officers under him were instructed not to open the envelopes or review any documents marked with the names of attorneys or investigators sent to either the Petitioner or to his father, Walter Hummel. Nettles claimed that he established a procedure so that each Trooper would determine for himself whether writings identified as potential evidence fit within the evidence described in the warrant. All four troopers who participated in the search corroborated that these procedures were discussed and followed. An inventory of all items removed from the Hummel residence, given to the Petitioner's mother at the search, was also entered into evidence.

The Petitioner's mother, who was present for part of the search, testified that the police rifled through her son's legal documents. The Petitioner testified that many of his privileged documents were seized by the police at the conclusion of the search. These documents included a list of prospective witnesses and notes that the Petitioner had made for his attorney and investigator. He also testified that other confidential items, including a letter to his investigator and personal notes written to his attorneys, were missing following the police search.

Agreeing to a defense request, the judge presiding over the pretrial hearing reviewed *in camera* all of the documents contained in a plastic container, two folders, and a briefcase, which were alleged to contain the Petitioner's legal documents. Afterward, the judge denied the Petitioner's motion.

REASONS FOR GRANTING THE WRIT

I.

A CRIMINAL DEFENDANT WHO CLAIMS THAT GOVERNMENTAL MISCONDUCT HAS RESULTED IN A FIFTH AMENDMENT DUE PROCESS VIOLATION OF THE ATTORNEY-CLIENT PRIVILEGE OR A SIXTH AMENDMENT VIOLATION OF THE RIGHT TO COUNSEL SHOULD NOT HAVE TO DEMONSTRATE ACTUAL PREJUDICE TO MAKE OUT A CASE FOR DISMISSAL

Federal common law recognizes a privilege for communications between client and attorney for the purpose of obtaining legal advice, providing that such communications were intended to be confidential. The attorney-client privilege has been called "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Practicing attorneys recognize the importance of the privilege and the safe harbor that it provides to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice." *Id.*

In Pennsylvania, the attorney-client privilege is found in 42 Pa. C.S. § 5916, which provides:

> In a criminal proceeding counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

The privilege is considered so essential that even an inadvertent disclosure of materials protected by this privilege, and the dilemma posed for counsel who are in receipt of such materials, prompted the American Bar Association Standing Committee on Ethics and Professional Responsibility to issue two formal opinions on the subject.

In November 1992, the Committee issued an opinion, based upon the Model Rules of Professional Conduct, relating to the inadvertent disclosure of confidential materials. The opinion states:

> A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.

ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992).

Two years later, the Committee issued another formal opinion, this one regarding the unsolicited receipt of privileged or confidential materials. The committee stated:

> A lawyer who receives on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed; she should notify her adversary's lawyer that she has such materials and should either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994).

In establishing these guidelines, the ABA appears to presume prejudice from the use of such materials by opposing counsel, such as a prosecutor. The ABA recognizes that even the accidental acquisition of documents protected by the attorney-client privilege is potentially devastating to a client's case. Therefore, it should follow that the client should not have to demonstrate prejudice to obtain relief based on the misuse of these written materials. Yet this Court has not decreed the protections that the ABA regards as absolutely essential to protect a client's relationship with his attorney. Indeed, this Court has held for some time that criminal charges should not be dismissed without an actual show of

prejudice by the defendant whose confidences have been violated by the police or prosecutors.

A. Fifth Amendment Protections

For more than half a century this Court has recognized that outrageous misconduct by law enforcement officers in detecting and obtaining incriminating evidence could rise to the level of a due process violation. *See Rochin v. California*, 342 U.S. 165 (1952). Yet it has also ruled for some time that deprivations of a criminal defendant's due process rights under the Fifth and Fourteenth Amendments do not require the dismissal of charges against him. In *United States v. Blue*, 384 U.S. 251, 255 (1966), this Court explained:

> Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, [the defendant] would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. . . . Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.

As demonstrated above, however, this Court's policy directly conflicts with the position taken by the American Bar Association, which recognizes the harm that is inherent in such police and prosecutorial misconduct.

B. Sixth Amendment Protections

The Sixth Amendment provides that an accused shall enjoy the right "to have the assistance of counsel for his defense." This right, which is fundamental to our system of justice, is meant to assure fairness in the adversary criminal process. *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)

This Court traditionally has been responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective. *See, e.g., Moore v. Illinois*, 434 U.S. 220 (1977). Yet it has explained that, an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates: (1) deficient performance, and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668 (1984). Implicitly recognizing the necessity for preserving society's interest in the administration of criminal justice, however, this Court has held that Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.

In *Gideon v. Wainwright*, *supra*, the defendant was totally denied the assistance of counsel at his criminal trial. In *Powell v. Alabama*, 287 U.S. 45 (1932), judicial action before or during trial prevented counsel from being fully effective. In *Black v. United States*, 385 U.S. 26 (1966), and *O'Brien v. United States*, 386 U.S. 345 (1967), law enforcement officers improperly overheard pretrial conversations between a defendant and his lawyer. None of these deprivations, however, resulted in the dismissal of the indictment. Instead, the conviction in each case was reversed, and the Government was free to proceed with a new trial.

Similarly, when the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, before trial but after the institution of adversary proceedings, the remedy that is typically imposed by this Court is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted. *See, e.g., Gilbert v. California*, 388 U.S. 263 (1967). In addition, this Court has held that certain violations of the right to counsel may be disregarded as harmless error. *See Moore v. Illinois*, 434 U.S. 220, 232 (1977); *Chapman v. California*, 386 U.S. 18 (1967).

In prior decisions, this Court has identified, and then neutralized, the taint by tailoring relief appropriate in the circumstances to assure the defendant effective assistance of counsel and a fair trial.

The premise of these cases is that the constitutional infringement identified has had some adverse effect or has at least threatened some adverse effect upon the effectiveness of counsel's representation, or has produced some other prejudice to the defense. In the absence of such an impact on the criminal proceeding, however, this Court has not found any basis for imposing a remedy in that proceeding, "which can go forward with full recognition of the defendant's right to counsel and to a fair trial." *United States v. Morrison*, 449 U.S. 361, 365 (1981). Indeed, *Morrison* stands for the principle that, "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate. . . . The remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression." *Id.* at 365-66. The Court rejected the view

that dismissal was appropriate "to deter deliberate infringements of the right to counsel" because "it would warrant dismissal . . . in any case where there has been a knowing violation," even in the absence of "a pattern of recurring violations by investigative officers." *Id.* at 366.

The assumption in *Morrison* and it predecessors — that a defendant should be able to demonstrate prejudice if documents or other items were seized in violation of his attorney-client privilege — is fundamentally flawed. Neither the defendant nor his attorney will necessarily remember all of the correspondence that passed between them or the documents that were in the possession of the client prior to the search by law enforcement officials. Nor will either be able to calculate with certainty how the defense was damaged by this illegal behavior by the prosecution.

Because an improper search such as the one that occurred in this case strikes at the heart of the attorney-client privilege, "the oldest of the privileges for confidential communications known to the common law," no proof of prejudice should be required. It is unrealistic to suppose that any measure short of requiring the dismissal of the charges against the defendant victimized by this misconduct will deter future misconduct by the police and the prosecutor.

In the two decades since this Court decided *Morrison*, police and prosecutorial zeal have imprisoned more citizens than ever before in this nation's history. The United States enjoys the dubious distinction of having a larger percentage of our populace imprisoned than in any other advanced nation.

It is respectfully suggested that this Court reexamine the wisdom of its decision in *Morrison* in light of current events and consider whether it should eliminate the requirement that a criminal defendant show actual prejudice to assert his Fifth and Sixth Amendment rights when the attorney-client privilege is violated. To rule otherwise conjures up uncomfortable images of British Redcoats pawing through a Colonial citizen's private correspondence with his attorney to unearth materials with which to prosecute him. Presumably, this was one of the chief reasons that we fought a Revolution 225 years ago.

CONCLUSION

The undersigned respectfully requests that this Court grant certiorari in this matter for the reasons stated above.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA DATED AND FILED JANUARY 5, 2001

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1139 MDA 2000

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MICHAEL HUMMEL,

Appellant

Appeal from the Order Entered April 24, 2000
In the Court of Common Pleas of Schuylkill County
Criminal Division at No. 336-A-1998.

BEFORE: POPOVICH, EAKIN and BECK, JJ.

MEMORANDUM: FILED JAN – 5 2001

Michael Hummel (Hummel) appeals the judgment of sentence. We affirm.

Hummel, a police officer in Girardville Borough, was arrested on February 6, 1998, and charged, *inter alia*, with involuntary sexual intercourse, aggravated indecent assault, and corruption of minors. Prior to Hummel's trial, local police and the district attorney were informed that Hummel's

father, Walter Hummel, was attempting to threaten witnesses[1] and obtain perjured testimony in his son's pending case. In September 1998, Pennsylvania State Police executed a search warrant at the home of Hummel's parents seeking evidence to support the allegations against his father.[2] Immediately thereafter Hummel filed a motion to dismiss his case for prosecutorial misconduct. He claimed that he resided in his parents' home and that during the search police violated his Fifth and Sixth Amendment rights by reviewing and taking privileged attorney-client communications related to his case. In June 1999, after two hearings, the trial court refused to dismiss the case.

In November 1999, after a jury trial, Hummel was convicted of 1 count of aggravated indecent assault[3] and three counts of corruption of minors.[4] Post-sentence motions were denied on April 24, 2000. Hummel now appeals.

On appeal he raises the following issues:

1. Did the Commonwealth commit prosecutorial misconduct when it executed a search warrant

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1. Most witnesses were underage young women who had made the allegations of improper behavior leading to Michael Hummel's arrest.

2. Charges were filed against Walter Hummel who subsequently pled guilty to charges of criminal attempt.

3. 18 Pa.C.S. § 3125(8).

4. 18 Pa.C.S. § 6301(a).

at the Defendant's home during the pendency of this case and at which place various confidential communications between the Defendant, his attorneys and investigators was [sic] either seized and/or reviewed by the police agents of the Commonwealth of Pennsylvania?

2. Was there sufficient evidence to convict the Defendant of aggravated indecent assault where the Commonwealth failed to prove an essential element of a crime charged, that is, that the Defendant and the other person were not married to each other?

3. Was there sufficient evidence to convict the Defendant of corruption of minors where the only evidence of corruption was a brief kiss between the Defendant and a girl?

4. Was the verdict of guilty for corruption of minors contrary to the weight of the evidence where the only evidence was a brief kiss between the Defendant and a girl?

Appellant's Brief at 4.

Hummel argues, in his first issue, that his case should have been dismissed before trial because the government engaged in prosecutorial misconduct which violated his Fifth Amendment right to due process and his Sixth Amendment

right to counsel.[5] Specifically, he claims that police actions — seizing and viewing confidential communications between him and his attorney during the search — constitute outrageous governmental conduct that warrants dismissal of his case.[6] We disagree.

As authority for his position, Hummel points to certain United States Supreme Court decisions and federal case law. However, a review of those cases and their progeny does not provide support for his argument. Whether a defendant claims that governmental misconduct has resulted in a Fifth Amendment due process violation of attorney-client privilege or a Sixth Amendment violation of the right to counsel, the defendant must show actual prejudice to make out a case for dismissal. ***See U.S. v. Voight***, 89 F.3d 1050, 1065 (3d Cir. 1996), ***cert. den.***, 519 U.S. 1047 (1996) (stating due process claim of outrageous government conduct premised on intrusion into attorney-client relationship cognizable only where defendant can point to actual and substantial prejudice); ***United States v. Morrison***, 449 U.S. 361, 365-66 (1981) (finding dismissal of accused's indictment on basis

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5. Hummel also makes a generic claim that comparable provisions of the Pennsylvania Constitution have been violated but has failed to support those claims as required under Pa.R.A.P. 2119(b); ***Commonwealth v. Rogers***, 605 A.2d 1228 (Pa. Super. 1992). Accordingly, we have not addressed that claim.

6. We have assumed in light of the facts that Hummel had standing to raise his claims which do not challenge the legality of the search per se but claim that incident to the search his attorney-client privilege was compromised giving rise to his claims that "outrageous governmental conduct" resulted in the violation of his Fifth and Sixth Amendment rights.

of violation of Sixth Amendment right to counsel inappropriate, even where government conduct is deliberate, defendant must demonstrate prejudice to obtain a remedy). Here Hummel makes no assertion that he was prejudiced in any way before or at trial.[7] Moreover, a review of the record supports the pre-trial court's conclusion that there was no evidence that the Commonwealth had gained privileged information or that action by police could be construed as willful or malicious. Order, 6/15/99.

The attorney-client privilege, codified at 42 Pa.C.S. § 5916, provides that "in a criminal proceeding, counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client

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7. We note that at the time the search occurred Hummel had already been charged. Thus, contrary to most Fifth Amendment claims of outrageous governmental conduct this is not a claim that due process rights were violated by governmental action that produced incriminating evidence leading to defendant's arrest and conviction. ***See Hampton v. U.S.***, 425 U.S. 484 (1976) (stating no violation of due process rights where government supplied heroin defendant sold to undercover agent); ***Rochin v. California***, 342 U.S. 165 (1952) (forcing accused to undergo involuntary surgical procedure to obtain morphine capsules used to convict defendant for illegal possession violated due process); ***U.S. v. Twigg***, 588 F.2d 373 (3d Cir. 1978) (finding where government establishes speed laboratory and neither defendant has know-how to manufacture methamphetamine, nature and extent of police involvement was so overreaching as to bar prosecution on due process grounds); ***U.S. v. Marshank***, 777 F. Supp. 1507 (N.D. Cal. 1991) (stating pre-indictment collaboration with defendant's attorney to build case against defendant and effect his arrest was prosecutorial misconduct that violated due process).

be compelled to disclose the same . . . ." Thus, the attorney-client privilege protects confidential communications which may be defined as those which relate "to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter . . . ." ***Commonwealth v. Mrozek***, 657 A.2d 997 (Pa. Super. 1995) (citing ***United States v. United Shoe Machinery Corp.***, 89 F. Supp. 357, 358-59 (D.C. Mass. 1950)). Here, Hummel asserts that the documents which were seized as well as others which were disturbed or viewed were confidential communications. We find these assertions belied by the record.

Instantly, the Honorable Cyrus Palmer Dolbin held two comprehensive hearings on Hummel's pre-trial motion to dismiss. At the initial hearing, Trooper Nettles, who directed the search, explained that officers were instructed not to open envelopes or review any documents marked with the names of attorneys or investigators sent to either Michael or Walter Hummel. A procedure was also set up for him to determine whether writings identified as potential evidence fit within the warrant description of evidence sought in connection with the allegations against Walter Hummel.[8] R.R. 38a-41a; 48a. All four troopers who participated in the search corroborated that these procedures were discussed and followed. An

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8. The police were looking in particular for samples of Walter Hummel's handwriting and, *inter alia*, any writings containing information on the witnesses/victims, directions to their homes, photos of them, personal telephone directories and the registration number of an undercover car used in the Walter Hummel investigation. Search Warrant Affidavit, 9/03/98 at 2.

inventory of all items removed from the Hummel residence, given to Mrs. Hummel at the search, was also entered into evidence.

Hummel's mother, who was present for part of the search, testified that the police rifled through her son's legal documents, R.R. 106a; Michael Hummel testified that many of his privileged documents were seized. He specifically claimed that a list of prospective witnesses and notes that he had made for his attorney and investigator were among the documents identified as taken. R.R. 163a; 166a. He also claimed that other confidential items, including a letter to his investigator and personal notes written to his attorneys, were missing. R.R. 156a-160a. On cross-examination, however, Hummel acknowledged, as did his mother, that no writing taken by the police had his name or an attorney's name on it. R.R. 121a-125a; 128a-130a; 186a-191a. Moreover, it was established that the list of names Hummel claimed was a defense document was in fact the same list of individuals his father was allegedly attempting to intimidate. R.R. 91a. With regard to the additional privileged documents Hummel claimed were missing, all participating troopers testified that they had taken nothing other than those items listed on the inventory list. R.R. 212a-255a. Finally, we note that the pre-trial court agreed to a defense request that he review *in camera* all the documents contained in a plastic container, two folders and a briefcase, all of which allegedly contained Hummel's legal documents, to determine whether there were any privileged attorney-client communications therein. R.R. 205a-207a. Thereafter, Judge Dolbin denied Hummel's motion.

Appendix A

This record clearly supports the pre-trial judge's finding that the evidence did not demonstrate that confidential communications had been seized. Hummel did not show that privileged facts or legal advice appeared in the documents taken. Moreover, the contested issue of whether other privileged documents were taken was a credibility determination for the fact finder. ***Commonwealth v. Vesel***, 751 A.2d 676 (Pa. Super. 2000). Accordingly, we agree with the pre-trial court that there was no evidence that privileged information was acquired by the Commonwealth and, therefore, no merit to Hummel's claim that police violated his attorney-client privilege.

With regard to Hummel's remaining three issues, after a thorough review of the record, the briefs of the parties, and the applicable law, we find that the opinion of the Honorable William E. Baldwin properly and ably disposes of Hummel's challenges to the weight and sufficiency of the evidence. We therefore affirm those issues on the basis of the well reasoned trial court opinion.

Order affirmed.

Judgment Entered.

s/ [illegible]
Prothonotary

Date: JAN – 5 2001

APPENDIX B — OPINION AND ORDER OF THE COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY — CRIMINAL DATED AND FILED APRIL 24, 2000

COURT OF COMMON PLEAS OF
SCHUYLKILL COUNTY — CRIMINAL

NO. 336-A-1998

COMMONWEALTH OF PENNSYLVANIA

vs.

MICHAEL HUMMEL,

Defendant

* * *

BALDWIN, P.J.

OPINION OF COURT

On November 10, 1999, following a trial by jury, the defendant was found guilty of aggravated indecent assault and three counts of corruption of minors. On December 28, 1999, he was sentenced on the aggravated indecent assault charge to a period of confinement of twelve to twenty-four months in a state correctional facility. On each of the three corruption of minors charges the defendant was sentenced to one to two months to run concurrent to each other, but consecutive to the sentence he received for the aggravated indecent assault, so that his total sentence was thirteen to twenty-six months.

Appendix B

The defendant filed a timely post-sentence motion, which has been, briefed by both sides and is before the court for disposition. In that motion the defendant raises the following issues: (1) whether the evidence was sufficient to convict the defendant of aggravated indecent assault; (2) whether the evidence was sufficient or the verdict against the weight of the evidence with regard to the corruption of minors charge relating to the minor victim Shannon Hanks; (3) whether the court erred in denying his motion to dismiss for prosecutorial misconduct; (4) whether the sentence for the corruption of minors conviction relating to the victim Shannon Hanks was disproportionate to the evidence and (5) whether the defendant should be sentenced to serve his incarceration in a county facility.

The defendant was convicted of aggravated indecent assault, 18 Pa.C.S.A. §3125(8), which as it relates to this case required the Commonwealth to prove the defendant engaged in penetration, however slight, of the genitals of the complainant with a part of his body at a time that the complainant was less than sixteen years of age and the defendant was four or more years older than her, and that the complainant and defendant were not married to each other at the time. The defendant argues that the Commonwealth failed to prove that he and the complainant were not married at the time of the incident.

At trial the Commonwealth presented evidence that the victim, Angela Butler, was born on June 10, 1984, and that the defendant was born June 23, 1972. Therefore, during the summer of 1997, Ms. Butler was thirteen years of age, and the defendant was twenty-five. Ms. Butler testified that

during that summer she knew the defendant as a police officer in the Borough of Girardville, where she lived. Although the borough had a curfew for minors by ordinance that summer, the defendant had told her that she did not have to be in by curfew.

She further testified that one afternoon she encountered the defendant at the borough park and he asked her to meet him later that night at the bridge which spans a creek within the borough. No specific time was set for the meeting, and after falsely telling her parents that she would be staying at a friend's house that night, Ms. Butler "hung out" at the bridge until the defendant arrived.

He initially pulled up to her in a fully marked police cruiser at 11:30 p.m. There were other kids in the area, and he told her to wait there for him until he returned. He then chased the others from the immediate area and returned in the cruiser to where she was waiting. The defendant, dressed in police uniform, exited the vehicle and escorted her a short distance down a dirt path. There he began touching her underneath her bra and placed his hand inside her pants and his finger inside her vagina. After a few minutes they returned to the police car. They sat inside talking for awhile, and then the defendant grabbed her hand, pulled down the zipper to his pants, placed her hand around his penis, and moved it up and down. At the same time the defendant told Ms. Butler that he would like to go out with her friend Tammy. She responded that she thought he was engaged. He answered her: "It doesn't matter. I fool around."

In ***Com. v. Shilling***, 288 Pa. Super. 359, 431 A.2d 1088 (1981), the defendant argued that his convictions of rape,

involuntary deviate sexual intercourse and indecent assault should be overturned because the Commonwealth had failed to establish that he and the complainant were not married at the time of the incident as required by the statutes. Rejecting that argument, the court found the element of non-marriage to be established through circumstantial evidence in the form of the victim's testimony that she was single, had only met the defendant a few days before the incident and had not seen him again after the incident. There was also evidence that both the defendant and complainant lived at home with their parents.

In ***Com. v. Cole***, 299 Pa. Super. 429, 445 A.2d 829 (1982), the defendant also argued that the Commonwealth had failed to prove that the victim was not his spouse. Again this court found that element to be established by circumstantial evidence, relying on a difference in surnames between the defendant and victim, the differences in their ages, differences in race, the location of the incident (a boiler room at a state hospital) and the character of the incident (victim hollering, eyes blackened and covered with blood). In support of his conclusion that the element of non-marriage can be established from circumstantial evidence, the ***Cole*** Court noted with approval three cases from other jurisdictions.

In ***People v. Harrell***, 252 Cal.App.2d 735, 60 Cal. Rptr. 864 (1967), a California court found that the difference in surnames between the victim and defendant, the victim's testimony that she had not seen the defendant prior to the rape and the victim's age of sixteen supported the inference of non-marriage. Another California court in ***People v.***

Peters, 149 Cal.App.2d 94, 308 P.2d 42 (1957), found non-marriage to be established by the disparities in the parties' ages and surnames. And lastly, in ***People v. Jones, et al.***, 53 Ill.App.3d 197, 10 Ill. Dec. 8657, 368 M.E.2d 452 (1977), an Illinois court found that the differences in surnames and ages of the victim and defendant and the victim's testimony that she learned the defendant's name at trial all supported the inference of non-marriage.

Similarly in this case, although the assistant district attorney did not specifically ask Ms. Butler whether she and the defendant were married, there is ample circumstantial evidence to establish proof beyond a reasonable doubt that the defendant and Ms. Butler were not married. They have different surnames; at the time of the incident she was thirteen years old and he was twenty-five; she testified that she knew him through his position as a police officer; the incident took place late at night in a wooded area near a municipal bridge and inside his police cruiser parked on that bridge; during the incident he solicited her help in getting another girl to go out with him; during this same conversation he acknowledged being engaged and "fooling around;" and the victim testified that she lived with her mom and lied to her mother so that she could stay out after curfew. We find the cumulative effect of this evidence to be such that the jury could easily have been convinced beyond a reasonable doubt that the defendant and Ms. Butler were not married at the time that the crime was committed.

The defendant next argues that the evidence was insufficient to support a conviction and that the conviction was against the weight of the evidence to establish the charge

of corruption of minors as it relates to the minor victim Shannon Hanks. In reviewing a claim of insufficiency of evidence the court must consider whether the evidence and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit a jury to find that all of the elements of the crime were present beyond a reasonable doubt. ***Com. v. Robinson***, 554 Pa. 293, 721 A.2d 344, 348 (1998). In determining whether a verdict is against the weight of the evidence, the court must be guided by the principle that a new trial should be awarded only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and an award of a new trial is imperative to avoid a miscarriage of justice. ***Com. v. Brown***, 538 Pa. 410, 648 A.2d 1177, 1189 (1994); quoting, ***Thompson v. City of Philadelphia***, 507 Pa. 592, 598, 493 A.2d 669, 672 (1985).

Shannon Hanks testified that she turned sixteen during July of 1995, and that during that summer she and her friends occasionally sneaked out of their homes after curfew and walked around Girardville at night. She knew the defendant to be a police officer in Girardville, and he had conversations with her and her friends, including Jennifer Johnstone and Katie Butler, during which he encouraged them to sneak out of their homes at night after curfew. These conversations took place while the defendant was in uniform and in his police car. She also described an incident that took place when she was fifteen or sixteen during which she was at the borough hall to see the defendant. The defendant was on duty and in uniform at the time, and they kissed.

Katie Butler corroborated Ms. Hanks testimony, confirming that the defendant, while in uniform and driving

the police car, would stop and talk to her and her friends and tell them that they would not get into any trouble if they were to sneak out of their homes after curfew at night. After he said this to them, she and her friends did sneak out on several occasions, and on at least one of those occasions she saw the defendant in the borough park.

Jennifer Johnstone also corroborated Ms. Hanks' testimony, describing an incident during which the defendant, while in police uniform, specifically asked her, Katie Butler and Ms. Hanks whether they would be going out later after curfew. She confirmed that this happened during the summer of 1995, and that they agreed to sneak out and meet the defendant at the park after curfew. She described how this meeting took place at 1:30 a.m., and that the defendant talked to her and her friends for a few minutes and then left because he was getting off duty at 2:00 a.m. He later returned in his personal car and talked to them a short time more. On cross-examination Ms. Johnstone made clear that the defendant was specifically asking her and her friends, which included Shannon Hanks, to sneak out of their homes after curfew.

The crime of corruption of minors is defined in relevant part as follows:

> (a) Offenses defined. —
>
> (1) Whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime,

> or who knowingly assists or encourages such minor in violating his or her parole or any order of court, commits a misdemeanor of the first degree.

18 Pa.C.S.A. §6301. As observed by the Superior Court in ***Com. v. Burak***, 232 Pa.Super. 499, 335 A.2d 820 (1975), corruption of a minor can involve conduct toward a child in an unlimited number of ways. The statute was intended to cover a broad range of conduct in order to protect the welfare and security of children.

The defendant has directed his entire argument on this issue toward the kissing incident between him and Ms. Hanks. He argues that the kiss, which apparently was mutual, could not alone support a conviction of corruption of minors. Defendant totally ignores the evidence that he encouraged Ms. Hanks to violate the borough curfew and sneak out of her home late at night. Not only did he assure her that the curfew would not be enforced, he asked her and her friends to meet him after they sneaked out of the homes where their families thought they were safely asleep. There is no requirement that there be criminal activity as a basis for a corruption of minors charge.

As noted by the Superior Court in ***Com. v. Decker***, 698 A.2d 99 (Pa. Super. 1997), ***appeal denied***, 550 Pa. 698, 705 A.2d 1304, the statute states "by any act," not "by any criminal act." There is sufficient evidence in the record from which the jury could have concluded beyond a reasonable doubt that the defendant encouraged Shannon Hanks to violate not only the borough curfew, but also her parent's

trust so that she could sneak out of her home late at night and meet with him at a time when her parents believed her to be safely asleep in her bedroom. At the time she was sixteen years of age, and he was twenty-three. We believe that evidence is sufficient to support a conviction for corruption of minors. Additionally, the kiss between the defendant and Ms. Hanks considered in the context of this other evidence, could also be considered by the jury as evidence of the defendant's attempt to encourage Ms. Hanks to engage in an illicit relationship with him.

Although not addressed in the defendant's brief, we note that the jury found the defendant not guilty of the two corruption of minors charges relating to Jennifer Johnstone and Katie Butler. The defendant would be in error if he is relying on those verdicts to support a conclusion that he did not encourage Ms. Hanks to break curfew. The court cannot conclude that the jury discounted the evidence regarding the defendant's efforts to encourage curfew violations as to all of the girls and only found him guilty on the corruption charge regarding Ms. Hanks based solely on the evidence of the kiss.

Focusing only on the evidence regarding curfew violations, the verdicts regarding the three girls (Hanks, Johnstone and Katie Butler) may seem inconsistent; however, consistency in criminal verdicts is not a necessity. ***Com. v. Swann***, 635 A.2d 1103 (Pa. Super. 1994). Even when an acquittal on one count of an indictment is inconsistent with a conviction on a second count, the court looks at the acquittal as no more than the jury's assumption of a power which they had no right to exercise, but were, nevertheless, disposed to

do through leniency. As long as there is evidence in the record to support the verdict, a court will not disturb the verdict based on inconsistencies. ***Id.*** 1104-05. For the reasons already discussed, we find there is sufficient evidence in the record to support the defendant's conviction of corruption of minors as it relates to Shannon Hanks.

The defendant next argues that the court erred in denying his motion to dismiss for prosecutorial misconduct regarding a police search of his father's home. That issue was already considered by the Honorable C. Palmer Dolbin, J., and we see no need to discuss it further herein.

The defendant raises two issues regarding his sentence. First, he argues that the sentence of one to two months for his conviction of corruption of minors as it relates to Ms. Hanks was disproportionate to the facts at trial. His argument in this regard again focuses only the kiss between the defendant and Ms. Hanks and not on the defendant's other activities in encouraging Ms. Hanks to violate the borough curfew and her parent's trust. Accordingly, we find no merit to the defendant's argument.

Finally, the defendant asks that the sentence be modified so that he may serve his sentence in a county prison, rather than a state correctional facility. The only reason he puts forth to support this request is his desire to serve a portion of his time on work release. There was no discussion at the time of sentencing, or in his brief, to show that he would even qualify for a work release program. Nor has there been any claim for pressing financial concerns. The defendant is a single man with no claimed dependents and lives with his parents.

Appendix B

The sentence imposed took into consideration all of the information presented in the pre-sentence investigation and at the sentencing hearing. As a state sentence with a maximum less than five years, was the discretion of the court to direct that the defendant serve his time in either a county or state facility. The Schuylkill County Prison has very limited rehabilitation programs available due to budgetary constraints. If the defendant were to serve his time in the county prison, it would be very difficult, if not impossible, for him to accumulate points toward a state parole. He could very well serve the maximum sentence before release. More importantly, his rehabilitation would not be as complete without those programs.

Accordingly, we enter the following:

Appendix B

COURT OF COMMON PLEAS OF
SCHUYLKILL COUNTY — CRIMINAL

NO. 336-A-1998

COMMONWEALTH OF PENNSYLVANIA

vs.

MICHAEL HUMMEL,

Defendant

* * *

ORDER OF COURT

BALDWIN, P.J.

AND NOW, this 24th day of April, 2000, at 10:30 a.m., it is hereby ORDERED that the Defendant's Post-Sentence Motion is DENIED.

BY THE COURT,

s/ Baldwin, P.J.

APPENDIX C — ORDER OF THE COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY, CRIMINAL DIVISION DATED AND FILED JUNE 15, 1999

COURT OF COMMON PLEAS OF
SCHUYLKILL COUNTY
CRIMINAL DIVISION

NO. 336-1998

COMMONWEALTH OF PENNSYLVANIA

vs.

MICHAEL EDWARD HUMMEL,

Defendant

* * *

DOLBIN, J.

ORDER OF COURT

AND NOW, this 15th day of June 1999, IT IS HEREBY ORDERED that the Motion to Dismiss for Prosecutorial Misconduct is DENIED and DISMISSED. This Order is entered for the reason that we hold that prosecutorial misconduct may be established only where the Commonwealth or the police has committed some malicious and willful act which infringes upon the rights of the Defendant. Here the record is devoid of any action on the part of the police which could be construed as willful or

malicious. Even if the Commonwealth has come into knowledge of the Defendant's personal effects which would normally be privileged (and here there is no evidence even of that), we find no malicious act which would sustain a conclusion that the police or the Commonwealth acted maliciously.

BY THE COURT:

s/ Dolbin, J.
CYRUS PALMER DOLBIN,
JUDGE

APPENDIX D — PER CURIAM ORDER OF THE SUPREME COURT OF PENNSYLVANIA FOR THE MIDDLE DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DATED JUNE 29, 2001

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 0082 M.D. Alloc. Dkt. 2001

Petition for Allowance of Appeal from the
Order of the Superior Court

COMMONWEALTH OF PENNSYLVANIA,

Respondent

v.

MICHAEL HUMMEL,

Petitioner

ORDER

PER CURIAM:

AND NOW, this 29th day of June, 2001, the Petition for Allowance of Appeal is hereby **DENIED**.